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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 473

THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,

Intervenor-Respondents

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners devote this reply primarily to the Federal Power Commission's brief in opposition.* The Commission clearly indicates in its brief how it interprets this Court's decision in CATCO and, in so doing, it points up why, despite the "recency" argument advanced to the contrary, the Commission is in urgent

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*The filing of the Commission's brief was authorized by the Solicitor General. Significantly, he did not sign or join in it, notwithstanding the fact that here, unlike CATCO (*Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (1959)), the Government is a party.

need of immediate guidance as to the true meaning of CATCO and its impact on the Commission's administration of the Natural Gas Act.

The Commission's brief makes it clear that, despite the teachings of CATCO, it still believes that it may, nevertheless, find out-of-line prices to be required by the present and future public convenience and necessity solely on the basis of "an urgent need by the consuming public for the [additional] gas,"* and in the complete absence of any evidence demonstrating the "reason why" *producers need* such increased initial prices, at irrecoverable additional cost to consumers. Thus, the brief attempts to defend the Commission's clearly erroneous view that it can relieve producers of their burden of proof with respect to pricing and, at the same time, impose a burden on proponents of a conditioned rate to demonstrate (a) the unreasonableness of the proposed rate, (b) that it would have a materially adverse effect on consumers, and (c) that an alternative rate is reasonable (R. 485-6).

Moreover, the Commission contends that the "careful scrutiny" of initial prices which this Court held essential in CATCO is unnecessary here because a new price plateau beyond CATCO was not established in this case. Notwithstanding the fact that it has yet to reconsider the CATCO case on its merits, the Commission now takes the position that its error in that case, and repetition of that error in other cases now safely beyond the reach of judicial review has conclusively established a price plateau for the South

* FPC Brief, p. 9. Obviously, the public need in this case is a need of Transco and its utility customers for more gas in order that they might sell more gas, there being no evidence of a *fuel* shortage in the markets served by Transco.

Louisiana area against which the prices in this and future cases are to be measured (FPC Brief, pp. 9-10 and 15-16). Prices that have no validity save that bestowed by prior erroneous Commission action are, therefore, presented as having established a sacrosanct initial price level no longer open to question.*

No Respondent has sought to deny the public importance of the questions presented in the Petition—questions which go to the very heart of the way in which the Commission administers the Act. All vigorously support the decision below, the effect of which is to free the Commission of any responsibility for closely scrutinizing price in producer certificate proceedings, thus indefinitely avoiding the impact of rate regulation.**

Producer-Respondents, in seeking to create the impression that there is genuine record support for the result reached below, attempt to disguise the fact that they flatly refused to support *their own* for the initial prices here involved or to counter evidence that such prices would substantially increase the pipe-

* The Commission has yet to decide a major producer rate case. Except for the *Phillips* case, decided by the Presiding Examiner on April 6, 1959, argued before the Commission on October 2 and currently in limbo, there have not even been any Examiner's decisions in any major producer rate cases; hearings are only starting on many, and most are still in the investigative or pre-investigative stage.

** The petitions for certiorari in *Sun Oil Company* v. *FPC*, No. 321, this Term, and *Sunray Mid-Continent Oil Company* v. *FPC*, No. 335, this Term, cert. granted 28 Law Week 3147, which present relatively minor facets of the basic problem presented in this case, demonstrates the producers' desire to avoid rate regulation under Sections 4 and 5 of the Act, by pricing their gas under the Commission's relaxed and erroneous interpretation of Section 7.

line's costs and trigger favored nation increases in other contracts.* Respondent, Transcontinental likewise attempts to set up and then destroy a straw man by asserting that this Court could not possibly correct any error committed by the Commission without imperiling its entire project—an argument rejected in CATCO, since it completely ignores the fact that a reasonable condition to protect consumers from price exploitation need not jeopardize supply.

We submit that the interpretation of the CATCO decision as presented in the Federal Power Commission's brief (in which the Solicitor General did not join) demonstrates that the "responsible reaction to initial price proposals of producers" commanded by the CATCO decision will be achieved only if this Court acts to preserve the full vigor of the Natural Gas Act by granting the writ in this case.

Respectfully submitted,

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* Examiner's Decision, footnote 10, R. 419.